Supreme Court, U.S.
FILED
APR 24 1996
CLERK

(3)

No. 95-1240

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA

Respondent.

On Petition For Writ of Certiorari
To the Louisiana Supreme Court

REPLY BRIEF

RICHARD V. BURNES, Esq.
Counsel of Record

DMITRC I. BURNES, Esq.

BURNES & BURNES,
Attorneys at Law
Post Office Box 650
711 Washington Street
Alexandria, LA 71301-8030
Telephone: (318) 442-4300
Facsimile: (318) 442-8600

13pp

QUESTIONS PRESENTED

1. Whether a white defendant has standing to object to the race-based exclusion of grand jury foremen on Equal Protection grounds even if not of the same race as the excluded grand jury foremen?

2. Whether a white defendant has standing to raise the due process claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution?

3. Whether a white defendant has standing to raise the fair cross-section claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES..... iii

SUPPLEMENTAL STATEMENT OF THE CASE... 1

REPLY ARGUMENT..... 1

CONCLUSION..... 7

TABLE OF CITED AUTHORITIES

Pages

Cases

United States Supreme Court Cases

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328, (1975) 1, 2

Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984) 5, 6

Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) 4, 5

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) 4

Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) 4, 5, 6

Other Federal Cases

State v. Sneed, 729 F.2d 1333 (11 Cir. 1994) 5

United States v. Cronn, 717 F.2d 164 (5th Cir. 1983) 5

Louisiana Supreme Court Cases

State v. Campbell, 661 So.2d 1321 (La. 1995) 5

Other Louisiana Cases

State v. Campbell, 94-1140 (La.App. 3 Cir. 3/13/96); ___ So.2d ___, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96) 1

Constitution, Statutes, and Rules

United States Constitution, Amendment V 2, 3

United States Constitution, Amendment VI 2, 3

United States Constitution, Amendment XIV 3

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent's brief supplied this Court with a very thorough review of the procedural history of this case including activity subsequent to the filing of the instant petition. See *Respondent's Brief in Opposition to Petition for Writ of Certiorari* at pages 1-5 (hereinafter *Opp.* at ___). As noted by respondent, the Louisiana Court of Appeal, Third Circuit, denied relief on petitioner's remaining assignments of error, in *State of Louisiana v. Terry Campbell*, 94-1140 (La.App. 3 Cir. 3/13/96); ____ So.2d ____, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96). Under the Uniform Rules of Louisiana Courts of Appeal, Rule 2-18.2 (A), an application for rehearing must be filed with the clerk on or before 14 days after the rendition of the judgment. And under the Uniform Rules of Louisiana Courts of Appeal, Rule 2-13, filing may be accomplished by delivery or by mail addressed to the clerk. The filing of such papers shall be deemed timely when the papers are mailed on or before the due date. Petitioner mailed a Application for Rehearing to the Louisiana Court of Appeal, Third Circuit, on Wednesday, March 27, 1996. Therefore, although the Application for Rehearing was filed by the Clerk of Court on Friday, March 29, 1996, it was timely.

REPLY ARGUMENT

I.

This Honorable Court reviewed those categories of judgments of a highest state court, which although not a "final judgment or decree" with respect to all issues, were, nevertheless, still "final" for purposes of Supreme Court review in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, (1975). The case *sub*

judice most closely falls under the fourth category:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 482-83, 95 S.Ct. 1029, 1040, 43 L.Ed.2d 328, ____ (1975).

In the instant case, the federal constitutional issues raised in petitioner's Questions Presented have been finally decided by the Louisiana Supreme Court. Further proceedings are pending in which petitioner might prevail on the merits on nonfederal grounds, and on federal grounds which are questions in areas of well settled federal law. (Petitioner has raised questions concerning statements obtained from petitioner in violation of his Fifth Amendment right to remain silent and Sixth Amendment right to counsel. The issues raised concern well settled areas of federal law and their

application to the facts in the case.) Reversal of the Louisiana Supreme Court on the issues raised in the instant petition would preclude further litigation on petitioner's appeal and remaining assignments of error currently before the Louisiana Court of Appeal, Third Circuit, on an Application for Rehearing. In petitioner's case, a refusal by this Honorable Court to review immediately the Louisiana Supreme Court decision would seriously erode the policies behind the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Should Defendant prevail on other issues, the decision by the Louisiana Supreme Court denying white defendants standing to raise constitutional claims concerning race-based discrimination in the selection of grand jury foremen would stand and be binding law in Louisiana, thereby denying rights guaranteed to citizens by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Respondent also argues that this Honorable Court should hesitate to grant review as a result of policy considerations limiting federal review of state courts' determination of federal constitutional issues as a means to minimize federal intrusion into state affairs, and that this Court has often recognized and insisted that state courts be allowed the first opportunity to pass upon federal constitutional challenges to state action in a first instance, and that state courts, as their federal counterparts, are equally as competent in adjudicating federal constitutional claims. See *Opp.* at 9. However, here, the Louisiana Supreme Court has had a first opportunity to pass upon the federal constitutional challenge and has rendered its decision. This is not a case where a petitioner is seeking review before the state court has had an opportunity to speak.

II.

Respondent argues both that the Louisiana Supreme Court's decision is consistent with the decisions of this Honorable Court, and that this Honorable Court has not decided whether a white defendant has standing under *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) to bring an equal protection challenge to alleged racial discrimination against blacks in the context of a state grand jury foreman. These two positions are incompatible. Respondent is correct in its later ascertain that this Court has not addressed the issue of whether a white defendant has standing to bring an equal protection challenge in the present context. However, the decision of the Louisiana Supreme Court is in consistent with the policy driving the decisions of this Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), and in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).

Respondent harrowly reads that *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), to hold that a defendant, regardless of his or her race, has standing under the Equal Protection Clause to object to the race-based exclusion of any prospective petit juror whether or not that defendant and the excluded jurors share the same race. Respondent applies *Powers* to say that the Louisiana Supreme Court was without express by any authority to grant petitioner the relief he was seeking. On the contrary, petitioner applies the policy behind the decision in *Powers* to show that a defendant's race is irrelevant to his standing to bring an equal protection challenge.

Respondent uses a similarly narrow reading of *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), to deny authority to the Louisiana Supreme Court to grant

petitioner's relief. Once again, petitioner shows that *Peters v. Kiff* stands for the proposition that a white defendant has standing to raise due process challenges.

Respondent does concede that "it is clear from the *Rose* decision that discrimination against blacks in the selection of grand jury foremen violates the Equal Protection Clause of the Fourteenth Amendment." See *Opp.* at 14 n. 3.

III.

Respondent argues that there is no conflict between the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So.2d 1321 (La. 1995) with *United States v. Sneed*, 729 F.2d 1333 (11 Cir. 1994) and that *Sneed* is overruled by *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984) (thereby requiring the 11th Circuit to retreat from its line of decisions.) Respondent argues the incompatible positions that "there is no outstanding conflict" and that the present "conflict alone is insufficient in and of itself to grant relief." See *Opp.* at 15. Respondent is correct that this Honorable Court has the prerogative of not hearing a case even when there is a conflict, but one of the missions of this Court is to resolve such conflicts.

IV.

Respondent argues that there is only an apparent contradiction between *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983), and decisions of the United States Court of Appeals, Eleventh Circuit. See *Opp.* at 16-18. Respondent further argues that the conflicts disappear once this Honorable Court rendered the decision in *Hobby v. United States,* 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984). However, *Hobby* overruled the proposition that the role of a federal

grand jury foreperson is "constitutionally significant." *Hobby* did not overrule the proposition that if the grand jury foreperson's duties are more than ministerial, discrimination in the selection of grand jury foreperson would provide standing for a criminal defendant's constitutional claims.

V.

Respondent argues that petitioner's claim that a white defendant has standing to bring a due process attack is foreclosed by this Court's decision in *Hobby*. See *Opp.* at 18. In section IV above, respondent argued that cases relating to federal grand jury foremen were inapplicable to respondent's case. Here, respondent is arguing that *Hobby* (a federal grand jury foreman case) is applicable to petitioner's case. These two positions are inconsistent. The holding of *Hobby* is that when: 1) the grand jury foreman is selected from a properly constituted grand jury and 2) the duties of the grand jury foreman are merely ministerial, then race-based discrimination in selection of the grand jury foreman does not give rise to due process claims.

In the case *sub judice* the grand jury foreman is **not** selected from a properly constituted grand jury. In Louisiana, grand jury foremen are selected by methods similar to those used to choose grand jury foremen in Tennessee as explained in *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

Further, respondent argues that petitioner's claim should be dismissed because petitioner did not attack the Louisiana grand jury venire or Louisiana's system of selecting the grand jury itself. See *Opp.* at 18-19. It is true that petitioner does not allege there was discrimination in selection of the grand jury venire. It is true that petitioner does not attack the Louisiana system of selecting the grand jury and grand jury foreman as being facially discriminatory.

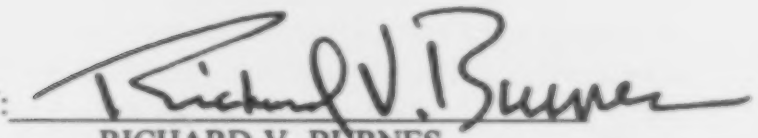
Petitioner's argument is that facially neutral statutes were applied in a racially discriminatory manner.

Respondent also dismisses petitioner's claim for review on a fair cross-[section] analysis under the Sixth Amendment. See *Opp.* at 19. The record reveals however, that petitioner has consistently argued that his fair cross-section claim is connected with his due process claim. The Louisiana Supreme Court explicitly denied the petitioner's right to raise constitutional claims based solely on the fact that petitioner is white.

CONCLUSION

For the reasons argued herein, and in the *Petition for a Writ of Certiorari*, petitioner respectfully requests that this Honorable Court grant certiorari and review the judgment of the Louisiana Supreme Court.

Respectfully Submitted,
BURNES & BURNES
Attorneys at Law

BY: 

RICHARD V. BURNES
Bar Roll Number 3692
711 Washington Street
Alexandria, LA 71301-8030
Post Office Box 650
Alexandria, LA 71309-0650
Telephone (318) 448-0482
Facsimile (318) 442-8600

Attorney for Terry Campbell
COUNSEL OF RECORD

-And-

DMITRC I. BURNES
Bar Roll Number 22283
711 Washington Street
Alexandria, LA 71301-8030
Post Office Box 650
Alexandria, LA 71309-0650
Telephone (318) 448-0482
Facsimile (318) 442-8600